Petition

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81-5952

IN THE UNITED STATES SUPREME COURT

OCTOBER TERM, 1981

PAUL ABRAHAM MCKINNEY,

Petitioner

v.

W. J. ESTELLE, JR., DIRECTOR,
TEXAS DEPARTMENT OF CORRECTIONS,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner, Paul Abraham McKinney, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered on October 28, 1981.

OPINIONS BELOW

On June 6, 1980, the United States District Court for the Northern District of Texas granted habeas corpus relief to the Petitioner who had been convicted of the offense of statutory rape of his adopted daughter in 1971 by trial before a jury in Dallas County, Texas. A copy of the decision of the District Judge is attached hereto as Appendix (A).

Prior to Petitioner's being granted relief in 28 U.S.C. 2254 proceedings by the District Court, the Texas Court of Criminal Appeals in Austin, Texas had affirmed the conviction of the Petitioner in direct appeal, McKinney v. State, 505 S.W.2d 536 (Tex. Crim. App. 1974).

Upon the District Court granting relief to the Petitioner, the Respondent, the Director of the Texas Department of Corrections, W. J. Estelle, Jr., by the Attorney General of the State of Texas, appealed the District Court's judgment of reversal to the Court of Appeals for the Fifth Circuit. The Court of Appeals reversed the decision of the District Court on September 30, 1981. A copy of that decision is attached hereto as Appendix (B).

The Petitioner, by counsel, made a timely Motion for Rehearing before the Court of Appeals. The Court denied the Motion for Rehearing on October 28, 1981, Appendix (C) attached hereto.

It is from the final denial of the Court of Appeals that the Petitioner petitions for the Writ of Certiorari to issue.

JURISDICTION

The order of the Court of Appeals was entered on October 28, 1981. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1254 (1).

QUESTION PRESENTED

WHETHER THE COURT OF APPEALS HAS RENDERED A DECISION REGARDING THE CONTEMPORANEOUS OBJECTION RULE THAT IS IN DIRECT CONFLICT WITH THE OPINIONS OF THIS COURT REGARDING FUNDAMENTALLY FAIR TRIAL, THE LAW AND FACTS OF THE CASE, AS WELL AS THE DECISIONS OF THE COURT OF CRIMINAL APPEALS FOR THE STATE OF TEXAS WHEREFROM THE CASE AROSE.

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Sixth Amendment to the Constitution of the United States provides in pertinent part:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State....and to have the assistance of counsel for his defense."

The Fourteenth Amendment to the Constitution of the United States provides in pertinent part:

> "Nor shall any state deprive any person of life, liberty, or property without due process of law;...."

STATEMENT OF THE CASE

The Petitioner was tried on plea of not guilty before a jury in 1971 in Dallas County, Texas for the offense of statutory rape of his adopted daughter. The jury found the petitioner guilty and assessed his punishment at sixty (60) years in the Texas Department of Corrections.

Petitioner appealed the conviction to the Texas Court of Criminal Appeals in Austin, Texas. In 1974, that Court affirmed the judgment and sentence, McKinney v. State,, (supra).

Petitioner, pro se, then sought habeas corpus relief pursuant to Article 11.07 V.A.C.C.P. in the Courts of the State of Texas alleging, inter alia, that he had been denied his constitutional rights by failure to afford him a speedy trial, failure of the prosecutor to make disclosures during discovery proceedings, as well as improper impeachment concerning a juvenile conviction, ineffective assistance of counsel and improper prosecutorial arguments at his trial in chief.

The Texas Court of Criminal Appeals again refused relief. Petitioner then petitioned the United States District Court for the Northern District of Texas in habeas corpus proceedings pursuant to 28 U.S.C. 2254.

The United States Magistrate found no merit to Petitioner's petition in his recommendations. The Honorable Robert M. Hill, the United States District Judge, agreed with the Magistrate's findings on six of Petitioner's allegations, being without merit.

However, on the seventh allegation pertaining to improper prosecutorial argument, the District Judge found that the highly inflammatory remarks made by the State's Attorney during Petitioner's trial, over the objection of counsel which were largely ignored by the trial judge, deprived Petitioner of a fundamentally fair trial without due process under the Sixth and Fourteenth Amendments to the Constitution of the United States. The trial judge's detailed, comprehensive opinion is attached as Appendix (A).

It was shortly after the District Court issued its order granting the Petitioner habeas corpus relief that a group of Dallas, Texas churchworkers who had been visiting Petitioner in the Texas State prison retained present counsel to aid the Petitioner.

Thereafter, the Respondent, through the Attorney General for the State of Texas, appealed the District Court's Order of relief to the Court of Appeals for the Fifth Circuit.

The Appeals Court set the case down for oral arguments and the case was heard.

On September 30, 1981, with Circuit Judge Tate dissenting, the panel reversed the decision of the District Court granting relief (Appendix B).

While the Appeals Court clearly held that the State's prosecutor went beyond the bounds of propriety. The panel, in a narrow application of Wainwright v. Sykes, 433 U.S. 72, held that because the Petitioner's counsel failed to perfect his repeated objections to the spate of inflammatory arguments by the State's Attorney (despite the fact the trial judge once told defense counsel to sit down during his objections and again ignored defense counsel's objections to the State's closing argument) the contemporaneous objection rule barred review of the Petitioner's case in Federal 28 U.S.C. 2254 proceedings.

Petitioner filed a Petition for Rehearing which was denied by the panel of the Court of Appeals and Petitioner instituted these instant proceedings.

REASON FOR ISSUING THE WRIT

This Court should issue Writ of Certiorari because the Court of Appeals for the Fifth Circuit has reversed a decision of the lower Federal Court that had correctly granted habeas corpus relief to the Petitioner based upon the decisions of this Court and the Courts of Appeals for the other circuits, as well as decisions of the Court of Criminal Appeals for the State of Texas wherefrom the appeal of the Petitioner first began.

Petitioner would rely upon Circuit Judge Tate's dissent which clearly outlines the problem in the Court of Appeals' decision beginning at page 11785, Appendix B.

> "The majority has quoted the most improper concluding argument made by the prosecutor. The majority has not, however, detailed the repeated prior improprieties by the prosecutor, and the unsuccessful attempts by the defendant's counsel to have the court assert curative action against these grossly improper arguments."

As Judge Tate further points out, the defendant's counsel did object to the grossly improper arguments. The State's procedural default that the Court of Appeals has fashioned into Wainwright v. Sykes, (supra) is that Petitioner's counsel did object, but failed to obtain an express ruling on each objection by the trial judge.

The quicksand under the Court of Appeals' logic is that the Texas Court of Criminal Appeals, in affirming Petitioner's direct appeal, McKinney v. State, (supra), clearly held:

> "The record reflects that immediately after appellant objected to the prosecutor's argument the Court retired the jury for deliberations without ruling on said objection."
> Idem. 506 S.W.2d at 541.

Such a holding as the Court of Appeals has rendered in the Petitioner's case has clearly placed the reins of the contemporaneous objection rule in the hands of trial judges who may, if they choose, give the prosecutor unconstitutional latitude to say anything to obtain a conviction and simply ignore defense counsel's objections.

The Court of Appeals treats this problem lightly by exhorting defense counsel who are "bold enough to begin the job (objection) to finish it".

The Constitutional protections of due process and fair trial should not suffer such tidy little rules of boldness against prejudicial trial judges and give judges in Texas, many of whom are former prosecutors themselves, the opportunity to devastate "fair trial" by ignoring an objection.

Furthermore, and most important here, is the fact that the Court of Appeals' decision in the Petitioner's case is in conflict with a recent case of the Texas Court of Appeals which sets out almost the precise words and actions of the prosecutor in Petitioner's case as conduct that violates due process and waives the failure to request such instructions from the bench for the jury to disregard such remarks, the application of Article 36.07 V.A.C.C.P.

The Texas Court of Appeals, speaking in Parr v. State, 606 S.W.2d, 928, in November of 1980, some months after the District Court granted Petitioner relief, held:

"Counsel for the State would have been outside the bounds of proper jury argument if he had accused defense counsel of manufacturing evidence, lying to the jury, or suppressing the truth. Carrillo v. State, 591 S.W.2d, 876,894 (Tex.Cr.App.1979); Lopez v. State, 500 S.W.2d 844 (Tex.Cr.App.1973).

"...The Prosecutor stated: 'Know why they didn't come in here (witness)? Because they couldn't testify that way.' Appellant objected, the State withdrew the statement, and appellant moved for a mistrial. Appellant did not request that the jury be instructed to disregard the argument. Unless an argument is so inflammatory that its prejudicial effect could not have been alleviated by an instruction to disregard, the failure to request such an instruction waives the error. See Duran v. State, 505 S.W.2d, 863, 864 (Tex.Cr.App.1974); Blassingame v. State, 477 S.W.2d, 600,604 (Tex.Cr.App.1972)."

Parr v. State, 606 S.W.2d 928, 930 and 931 (Tex.Cr.App.1980)
Emphasis Added.

Under the holdings of this Court in Donnelly v. DeChristoforo, 416 U.S. 637 (1974) and Harrington v. California, 395 U.S. 250, 254, the Petitioner respectfully presents that the Court of Appeals is in total error on its ruling that inflammatory arguments by the State's Attorney did not violate Petitioner's rights and immunities under the Cosntitution of the United States.

CONCLUSION

WHEREFORE, PREMISES CONSIDERED, Petitioner respectfully prays that this Court grant the Writ of Certiorari.

Respectfully submitted,

Mark Troy

Mark A. Troy

Appendix

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF TEXAS

DALLAS DIVISION

U. S. DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
FILED
JUN 6 1980
JOSEPH McELROY, JR., CLERK
BY R Johnston
Deputy

PAUL ABRAHAM McKINNEY, Petitioner	§	
V.	§	CIVIL ACTION NO. CA-3-77-1589-D
W. J. ESTELLE, JR., DIRECTOR TEXAS DEPT. OF CORRECTIONS, ET AL, Respondent	§	

O R D E R

Came on for consideration before the Court the findings, conclusions, and recommendation ("findings") of the United States Magistrate concerning the application for a writ of habeas corpus of Paul Abraham McKinney ("McKinney"). The Court has reviewed the findings, see Exhibit A, and McKinney's objections, and has concluded that the findings should be adopted in part and overruled in part and that McKinney's application for a writ of habeas corpus should be granted.

Exhaustion of State Remedies

The Magistrate's findings succinctly summarize the procedural history of McKinney's application for a writ of habeas corpus, McKinney's asserted grounds for relief, and the basis for respondent Estelle's motion to dismiss. The Court concurs in the Magistrate's finding that McKinney has exhausted claims one through seven in the Texas courts and in his recommendation that respondent's motion to dismiss should be denied. Specifically, the Court finds that McKinney fairly presented claims five and six in his pro se application for a writ of habeas corpus, see petitioner's

pro se application at allegations in support of proposition number one (1) (x) and (1) 2; petitioner's allegations in support of proposition number three (3) (d) and (3) (e); proposition number nine (9); petitioner's allegations in support of proposition number nine (9), and in the supplement to his application for habeas corpus, see Supplement at 3. McKinney's counsel reminded the state district court of McKinney's pro se application during the evidentiary hearing. Transcript of Writ Hearing at 68-69. The state court never indicated that it would not consider the allegations contained in either McKinney's pro se application or the supplement to his application for habeas corpus. Furthermore, this Court cannot assume that the state court failed to consider McKinney's fifth and sixth claims merely because it did not mention them in its findings of fact and conclusions of law. Houston v. Estelle, 569 F.2d 372 (5th Cir. 1978). Finally, the Court need not consider whether McKinney has exhausted his eighth claim for relief because McKinney abandoned this claim in his objections to the Magistrate's findings. See Petitioner's objections to the Magistrate's findings (Sept. 17, 1979) at 1. Thus, the Court is of the opinion that respondent's motion to dismiss should be denied because "all asserted claims in the petition have been exhausted in state court . . . ." Jones v. Wainwright, 608 F.2d 180, 182 (5th Cir. 1979).

The Merits of McKinney's Claims

The Court concurs in and adopts the Magistrate's findings with respect to McKinney's claims one through six. However, with respect to McKinney's seventh claim, the Court is of the opinion that the prosecutor's closing argument during the guilt or innocence phase rendered McKinney's trial fundamentally unfair. Compare Houston v. Estelle, supra, with Cronnon v. Alabama, 587 F.2d 246 (5th Cir.), cert. denied, 440 U.S. 974 (1979), and Alvarez v. Estelle, 531 F.2d 1319 (5th Cir. 1976), cert. denied, 429 .S. 1044 (1977).

In his seventh claim for relief McKinney alleges simply that the "prosecutor made improper argument." In support of his seventh claim, McKinney further alleges that "the prosecutor expressed his opinion of petitioner's guilt in front of the jury, and that he knew lots of things

about the case and felt strongly about it . . . ." Respondent does not contend that McKinney has failed to exhaust his state remedies with respect to this claim. [1] Nor does Respondent attempt to argue

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[1] Indeed, McKinney presented his claim concerning the prosecution's allegedly improper arguments both on direct appeal, see Appellant's brief at 23, and in his pro se application for a state writ of habeas corpus, see pro se application at proposition four.

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that the prosecutor's closing argument was fair and proper. Respondent contends only that McKinney cannot prevail on his seventh claim because he has not presented any evidence to disturb the presumption that the state court's "factual determinations" of the underlying issues are correct. 28 U.S.C. §2254(d)(1977). The Court is unconvinced.

Both Texas law and federal law limit the scope of permissible argument to the evidence and any reasonable inferences from the evidence. See Houston v. Estelle, supra at 380 n. 9. A prosecutor may not inject his personal opinion about the merits of the case or the credibility of the witnesses into his argument. Nor may a prosecutor punctuate his argument with comments concerning matters which have no evidentiary basis. Id.; Brown v. Estelle, 468 F.Supp. 42 (N.D. Tex. 1978), modified on other grounds, 591 F.2d 1207 (5th Cir. 1979).

However, improper prosecutorial argument does not necessarily compel the granting of habeas corpus relief. Rather, it is well-established that "improper jury argument by the prosecution will not justify habeas corpus relief unless it is 'so prejudicial that [it renders] the trial fundamentally unfair.'" Cronnon v. Alabama, supra at 251, quoting Houston v. Estelle, supra at 378 n. 8. The Court must evaluate any improper argument "in the context of the entire trial." Cronnon v. Alabama, supra at 251; see also, Brown v. Estelle, supra. Also the Court must look to both Texas and federal law in assessing McKinney's claim that the prosecutor's improper closing argument violated his right to a fundamentally fair trial under the due process clause. Houston v. Estelle, supra at 377-78 n. 8.

McKinney complains of the following argument which the prosecution made immediately before the jury retired to deliberate on his guilt or innocence:

Prosecution (Mr. Eubanks): . . . Now, this is about the most clear cut case of guilt I can imagine. Maybe it's because I have been living with the case a long time and I know more; there have been a lot of hearings outside of your presence. You're not able to hear everything. There have been a lot of objections made during the trial. You may wonder, now why is that objection being sustained? Why is that one being overrruled? Well, there were a lot of reasons for these things that you all never get to hear. A lot of these issues are taken care of outside of your presence, and evidence is admitted or ruled inadmissible outside your presence frequently. So, at any rate, there are a lot of things that I know about the case; I have talked with the people; I feel very strongly about it, and I sincerely hope you feel the same way about it. You heard the evidence. Surely, there can be no reasonable doubt, no reasonable doubt in anyone's mind here. I hope and I pray that if there should be, if there should be, if eleven people should have reasonable doubt, that that one person who knows good and well that he's guilty just as he's sitting here, holds out and votes his conviction, because ladies and gentlemen, I will try him day out and day in, day in and day out, for the rest of the time I'm with Henry Wade, because he's guilty as he's sitting in the courtroom today. If I have to, I will make a project out of it and I will ask you to return the only verdict which you can return in this case. That's a verdict of guilty.

Defense Counsel (Mr. Atkins): I object to that line of argument. He's testifying on behalf of the District Attorney.

The Court: Ladies and gentlemen, you will take the Court's charge, retire to the jury room, elect a foreman, and when you have arrived at a verdict, knock on the door and we will receive it.

Statement of Facts at 344-49.

In the context of McKinney's trial and against the "backdrop" of the prosecutor's earlier arguments, the Court does not hesitate to find that the argument about which McKinney complains was so egregious that it deprived him of his right to a fair trial under the due process clause.

The prosecution's opening argument made by Don Driscoll ("Driscoll"), see Statement of Facts at 296-301, served as a model of forensic discretion. Driscoll repeatedly urged the jury to decide the case on the facts that came from the witness stand rather than on his rhetoric. See Statement of Facts at 296-97, 300-01. Additionally, Driscoll asked the jury not to convict McKinney because Driscoll or Les Eubanks ("Eubanks"), the other prosecutor, or Henry Wade, the Dallas County District Attorney, said McKinney was guilty but because the facts warranted his conviction. Statement of Facts at 300-01.

However, Eubanks ranged far outside the record from the outset of the prosecutor's closing argument. Eubanks first attacked the motives and tactics of McKinney's counsel, Jerry Atkins ("Atkins"),in his effort to impress upon the jury that Atkins' closing argument was not evidence:

> I heard him [Atkins] tell you at length that he's not satisfied with the State's case. Well, that's certainly not unusual. I have been prosecuting felony cases for about two years, . . . but I have yet to see a defense counsel who is satisfied. In all of the cases I have witnessed or participated in, that defense counsel is not satisfied with the State's case. He's paid not to be, and his dissatisfaction is certainly no evidence that Mr. McKinney is innocent . . . . Let's don't confuse his argument with evidence . . . . The only evidence you're to use and [sic] governing your deliberations came from that witness stand the last two days.

Statement of Facts at 327-28.

Eubanks next intimated that Atkins had accused him of trying to "put an innocent man in the penitentiary," Statement of Facts at 328, and argued that the jury would have to find both that "the police did sloppy work investigating the case" and that the grand jury "wrongfully indicted" McKinney in order to acquit McKinney. Statement of Facts 328-29. Although the Court sustained Atkins' objection to Eubanks' argument about the evidentiary "weight" of McKinney's indictment, Eubanks immediately reiterated that the jury was "going to have to believe all of these people [the police and the grand jury] just flat made mistakes and that the Defendant is truthful" in order to acquit McKinney. Statement of Facts at 329.

Shortly thereafter, Eubanks again implied that the District Attorney's office had predetermined McKinney's guilt when he commented on the evidence that the jury would be able to consider during the punishment phase of McKinney's trial. Statement of Facts at 331. The Court again sustained Atkins' objection to Eubanks' argument at this point. Id.

Eubanks next went outside the record when he argued that the jury that had convicted McKinney of carrying a prohibited weapon "got a chance to hear him talk under oath to them just as you [members of the jury] have gotten to for the past couple of days, and they didn't buy his story in that case anymore than you're going to buy this one." Statement of Facts at 335. The Court overruled Atkins' objections to this line of argument. Statement of Facts at 335-36.

Eubanks again went outside the record when he told the jury that McKinney had received five years when he pleaded guilty to assault with intent to rape. Statement of Facts at 336. The Court sustained Atkins' objection to Eubanks' comments concerning the length of McKinney's prior sentence.

Next came a long exchange during which Eubanks persisted in going outside of the record in order to explain the stepdaughters' delayed out cry and to respond to Atkins' argument that some of the stepdaughters had filed false rape charges against him a few years before the incident for which he was on trial. Statement of Facts at 338-40. Atkins objected repeatedly to Eubanks' argument. The court sustained some of Atkins' objections and overruled others. Even after the court sustained Atkins' objections and instructed Eubanks to stay within the record, Eubanks continued to present matters not in evidence to the jury. In hypothesizing about the atmosphere at the McKinney home after the "inconclusive examination" one of McKinney's stepdaughters received from the police, [2] Eubanks stated:

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[2] The evidence revealed only that someone at the Dallas Police Department had examined one of two of McKinney's stepdaughters who had accused McKinney of rape and that no criminal charges were ever filed as a result of the examination. The prosecution successfully kept the examination results out of evidence and steadfastly denied that any written record or report of the examination existed.

> So they [the stepdaughters] are confronted now with the mother that doesn't know whether to believe them or not and [an] enraged father, and you can be convinced that they weren't welcomed back at the home with open arms. You can imagine what they talked about for the next little while. A mother who didn't know what to think and a father who I'm sure sat down and talked to them at length about what was going to happen to them if this ever came out again. And the fact that if they go down and get examined, they are not sure anything is going to be believed anyway.

Statement of Facts at 340. The court overruled Atkins' objection to Eubanks' argument in this instance. Id.

Several minutes later, Eubanks returned to the subject of the "inconclusive examination" which one of McKinney's stepdaughters received. Statement of Facts at 344. Atkins again objected, and the court obliquely instructed Eubanks to argue only matters in evidence. Id. Eubanks offered to reopen his case, and the court overruled his offer. Then, Eubanks improperly commented on Atkins' successive, successful objections: "He's [Atkins has] pretty well succeeded in destroying my train of thought as he's so adapt [sic] of [sic] doing." Statement of Facts at 344-45. Atkins properly objected to Eubanks' gratuitous and wholly improper comment; however, the court overruled the objection and instructed Atkins to "[l]et the attorney finish, please, sir." Statement of Facts at 345.

Shortly after the court's admonished Atkins, Eubanks made the argument about which McKinney complains.

The complained-of remark's context is crucial. Prior to the complained-of remark, Eubanks "repeated, over sustained objection, improper argument. He did so after having deliberately burdened the defendant's right to object to impermissible argument" by impeaching defense counsel's motives for objecting. Houston v. Estelle, supra at 384. He did so at a time when McKinney could respond only by objection. 3/

3/ The Court is compelled to note that the prosecution did not stay within the bounds of proper argument during the punishment phase of McKinney's trial either. Eubanks again argued that McKinney had lied to the jury that convicted him of carrying a concealed weapon. Statement of Facts at 368-69. He also argued that the jury should consider that McKinney refused to plead guilty and that "he dragged those girls and his ex-wife down through the mire of a public trial" in assessing his sentence.

In the State's closing argument at the punishment phase, Driscoll injected his personal opinions into the case. In commenting on McKinney's character witnesses, Driscoll said, "He's [McKinney has] brought in two good lifelong friends to testify that he's welcome back at their house. Well, that's fine and dandy. I think that's a sad commentary on them." Statement of Facts at 381. Driscoll later stated: "I have prosecuted and seen lots of rapes in this line of work, but I cannot conceive of a more horrible, a more degrading, a more aggravated fact situation than what we are talking about here. I can't conceive of a worse one . . . . I cannot conceive of anything more aggravated than what you have heard in this case." Statement of Facts at 384.

To the extent that respondent relies on Texas' "contemporaneous objection" rule to frustrate McKinney's claim, see McKinney v. State, 505 S.W.2d 536, 541 (Tex. Crim. App. 1974), the Court is of the opinion that McKinney has demonstrated the necessary "cause and prejudice" to circumvent the rule's strictures. Eubanks' repeated improprieties caused Atkins to fail to press his objection to the complained-of remark. Cf. United States v. Garza, 608 F.2d 659, 666 (5th Cir. 1979) ("while defense counsel could and, indeed, should have objected to the first instances of improper comment by the prosecutor, at some point the transgressions of this prosecutor cumulated so greatly as to be incurable; then objection to these extremely prejudicial comments would serve only to focus the jury's attention on them"); Houston v. Estelle, supra at 381-82 (repeated instances of improper argument and improper comments on defense counsel's successful objections may mitigate defendant's duty to object). The inherent prejudice in Eubanks' last remarks is evident.

> [T]he most important problem facing the jury was its decision to credit the testimony of . . . the [state's] witnesses or that of [the defendant] . . . . The prosecutor's comments . . . were expressly intended to influence this critical credibility choice; he introduced for the jury's consideration his own personal opinion as to this hoice, suggested the existence of information beyond that presented at trial to support his witnesses' credibility, and sought to use the status and influence of the entire government investigatory apparatus to bolster the believability of this case.

U. S. v. Garza, supra at 665-66 (footnote omitted).

As Judge Rubin recognized in his separate opinion in Cronnon v. Alabama, supra at 252 (Rubin, concurring in the result), claims of improper jury argument necessitate judicial linedrawing. Eubanks' argument was clearly more improper and more prejudicial than those approved in Cronnon v. Alabama, supra, and Alvarez v. Estelle, supra, but not nearly so egregious as that condemned in Houston v. Estelle, supra. However, the Court is convinced that Eubanks' final remarks, rife with suggestions that the court and defense counsel had frustrated the prosecution's attempts to present all of the evidence and laced with his firm personal conviction of McKinney;s guilt, crossed the boundaries of constitutionality and propriety, and deprived McKinney of the fundamentally fair trial to which he was entitled.

Therefore, McKinney's application for a writ of habeas corpus should be granted and judgment should be entered accordingly.

It is so ORDERED.

Dated this 12th day of June, 1980.

United States District Judge

Paul Abraham McKINNEY, Petitioner-Appellee,

v.

W. J. ESTELLE, Director Texas Department of Corrections, Respondent-Appellant.

No. 80-2296.

United States Court of Appeals, Fifth Circuit. Unit A

Sept. 30, 1981.

Director of the Texas Department of Corrections appealed from judgment of the United States District Court for the Northern District of Texas, Robert M. Hill, J., granting habeas corpus relief to state prisoner. The Court of Appeals, Jerre S. Williams, Circuit Judge, held that absent showing of adequate cause for procedural default occurring under Texas law, state prisoner was not entitled to habeas corpus relief since his claim was denied review by state courts because of the procedural default.

Reversed.

Tate, Circuit Judge, filed a dissenting opinion.

1. Criminal Law ⇐1030(1)

Under Texas law, a contemporaneous objection must be made to preserve errors for review on appeal of criminal prosecutions. Vernon's Ann.Tex.C.C.P. art. 36.07.

2. Habeas Corpus ⇐45.1(1)

Principles of comity and federalism prevent federal courts from granting relief in nature of habeas corpus to state prisoner whose claim was denied review by state courts because of procedural default, absent showing both of cause for default and resulting prejudice.

3. Habeas Corpus ⇐25.1(4)

Absent showing of adequate cause for procedural default occurring under Texas law when defense counsel failed to perfect his objection to prosecutor's improper closing argument by obtaining a ruling on it, state prisoner could not be granted relief in nature of habeas corpus since his claim had been denied review by the state courts because of the procedural default. Vernon's Ann.Tex.C.C.P. art. 36.07; 28 U.S.C.A. § 2254(c).

Appeal from the United States District Court for the Northern District of Texas.

Before CHARLES CLARK, TATE and WILLIAMS, Circuit Judges.

JERRE S. WILLIAMS, Circuit Judge:

This is an appeal by W. J. Estelle, Jr., Director of the Texas Department of Corrections, from the district court's judgment granting habeas corpus relief to Paul Abraham McKinney. He had been convicted in Texas state court. We reverse.

McKinney was indicted for statutory rape of his adopted daughter, Michelle, and pleaded not guilty to the charge. He was tried in 1971 before a jury in state district court in Dallas County, Texas, found guilty, and sentenced to sixty years confinement in the Texas Department of Corrections. The Court of Criminal Appeals affirmed the conviction. *McKinney v. State*, 505 S.W.2d 536 (Tex.Crim.App.

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APPENDIX "B"

1974). McKinney sought habeas corpus relief from the Texas state courts but was unsuccessful.

In 1977, McKinney filed a petition for habeas corpus in federal district court alleging, inter alia, denial of the right to a speedy trial, failure of the prosecution to make disclosures during discovery, improper impeachment by use of a remote juvenile conviction, ineffective assistance of counsel, and improper prosecutorial argument.

The petition was referred to a United States Magistrate who found no merit in any of the allegations and recommended the denial of the petition. The district court adopted the Magistrate's findings and conclusions with respect to all of the allegations except that of improper prosecutorial argument and granted the petition on that basis. It is from the judgment granting the petition for habeas relief that the State appeals.

FACTS

McKinney's trial in Texas state court was marked by numerous instances of improper comment and argument by both the prosecutor and defense counsel. The prosecutor's closing argument, however, was particularly egregious and forms the basis of this appeal. During his argument, the prosecutor divulged the length of McKinney's sentence for a prior conviction, gave his own explanation for the prosecutrix's delayed reporting of the crime, commented on the weight of the indictment as evidence and the motives of defense counsel in pressing his case, and suggested that McKinney's guilt was a foregone conclusion by mentioning evidence that could be introduced only at the punishment phase of the trial. Defense counsel objected throughout the argument and was sometimes overruled and sometimes sustained. The prosecutor then commented on defense counsel's continued objections by telling the jury, "He's [defense counsel] pretty well succeeded in destroying my train of thought...." When defense counsel objected to that comment, the trial court told him to sit down and let the prosecutor finish. The prosecutor's final statement was as follows:

> Now, this is about the most clear cut case of guilt I can imagine. Maybe it's because I have been living with the case a long time and I know more; there have been a lot of hearings outside of your presence. You're not able to hear everything. There have been a lot of objections made during the trial. You may wonder, now why is that objection being sustained? Why is that one being overruled? Well, there were a lot of reasons for these things that you all never got to hear. A lot of these issues are taken care of outside of your presence, and evidence is admitted or ruled inadmissable outside of your presence frequently. So, at any rate, there are a lot of things that I know about the case; I have talked with the people; I feel very strongly about it, and I sincerely hope you feel the same way about it. You heard the evidence. Surely, there can be no reasonable doubt, no reasonable doubt in anyone's mind here. I hope and I pray that if there should be, if there should be, if eleven people should have reasonable doubt, that that one person who knows good and well that he's guilty just as he's sitting here, holds out and votes his conviction, because ladies and gentlemen, I will try him from day out and day in, day in and day out, for the rest of the time I'm with Henry Wade, because he's guilty as he's sitting in the courtroom today. If I have to I'll

make a project out of it and I will ask you to return the only verdict which you can return in this case. That's a verdict of guilty.

Defense counsel objected immediately, but the trial court dismissed the jury without ruling on the objection, and defense counsel neither asked for a ruling nor renewed his objection.

RESOLUTION OF THE ISSUES

The district court found that the prosecutor's closing argument was so inflammatory and improper as to render the whole trial fundamentally unfair. While the State concedes, as in all candor it must, that the argument was improper, it contends that McKinney's failure properly to preserve the error in accordance with Texas' contemporaneous objection rule operates as a waiver of the issue in a habeas corpus proceeding.

[1] The prosecutor's final statement in his closing argument was blatantly improper. Under Texas law, however, a contemporaneous objection must be made to preserve such errors for review on appeal. Tex.Code Crim.Pro.Ann. art. 36.-07 (Vernon 1966). Although defense counsel objected at the proper time, he failed to perfect his objection by obtaining a ruling on it. This procedural default barred review of the claim in the Texas courts on direct appeal and habeas corpus. *McKinney v. State*, 505 S.W.2d 536 (Tex.Crim.App.1974).

[2, 3] Principles of comity and federalism prevent federal courts from granting relief in the nature of habeas corpus to a state prisoner whose claim was denied review by the state courts because of a procedural default, absent a showing both of cause for the default and resulting prejudice. *Wainwright v. Sykes*, 433 U.S. 72, 97 S.Ct. 2497, 53 L.Ed.2d 594 (1977); *Washington v. Estelle*, 648 F.2d 276 (5th Cir. 1981); *Tyler v. Phelps*, 643 F.2d 1095 (5th Cir. 1981).[1] This case must turn on the application of these most important principles. The district court found that McKinney had shown adequate cause and prejudice to overcome the procedural default and concluded that the error rendered the trial fundamentally unfair. Because we find that McKinney has not shown adequate cause for the default, we need not reach the issue of prejudice. The record as a whole shows that McKinney's trial did not lack fundamental fairness.

McKinney alleges two reasons for his counsel's failure to object properly at trial.[2] First, McKinney urges in his brief that "[t]he prosecutor's continuously improper remarks... prejudiced the peti-

1. Procedural defaults may be excused, notwithstanding *Wainwright*, where the state court reaches the merits of the claim despite a default, *Thompson v. Estelle*, 642 F.2d 986 (5th Cir. 1981), or where the state has its own rules excusing such defaults, *Clark v. Blackburn*, 632 F.2d 531 (5th Cir. 1980). Here, the state court refused to consider the merits of McKinney's claim, *McKinney v. State*, 505 S.W.2d 536 (Tex. Crim.App.1974), and Texas law does not excuse such defaults, *Jiminez v. Estelle*, 557 F.2d 506 (5th Cir. 1977).

2. McKinney also argues that the error was properly preserved under Texas law. In its review of this case on direct appeal, however, the Texas Court of Criminal Appeals found that defense counsel had not perfected his objection as required by Texas' contemporaneous objection rule and refused to consider the issue further. *McKinney v. State*, 505 S.W.2d 536 (Tex. Crim.App.1974). We are bound to follow the Texas court's determination on this matter. *County Court of Ulster County v. Allen*, 442 U.S. 140, 99 S.Ct. 2213, 60 L.Ed.2d 777 (1979); *Wainwright v. Sykes*, 433 U.S. 72, 97 S.Ct. 2497, 53 L.Ed.2d 594 (1977).

tioner so as to justify his failure to object at every instance where an improper argument was made." While it is true that continued improprieties on the part of the prosecution may, in some circumstances, excuse the defense of its duty to object, it cannot do so on this record. Our survey of post-*Wainwright* habeas corpus proceedings in this circuit has not revealed a single case in which the cause element of the *Wainwright* test was satisfied by the petitioner's allegation that prosecutorial misconduct caused the default.

The district court mistakenly relied upon *United States v. Garza*, 608 F.2d 659 (5th Cir. 1979), and *Houston v. Estelle*, 569 F.2d 372 (5th Cir. 1978), to support its holding that the improper prosecutorial argument was sufficient cause for McKinney's procedural default. Neither case, however, is applicable here.

Garza involved a direct appeal from a criminal conviction in federal court in which the appellant claimed that prosecutorial misconduct rendered the trial fundamentally unfair. As in the present case, the appellant failed to object properly at trial. Because the case was a direct appeal from a federal conviction, it was reviewed under the "plain error" standard; *Wainwright* was not at issue. The cause and prejudice test of *Wainwright* comes into play only in habeas petitions from state prisoners. While prosecutorial misconduct may be sufficient to constitute "plain error," it does not follow that the misconduct is sufficient to establish the cause element of the *Wainwright* test.

Houston was a habeas corpus case. The central issue there, however, was whether the petitioner had exhausted state remedies as required by 28 U.S.C. § 2254(c). The state court had refused to review the petitioner's claim regarding prosecutorial misconduct because he had failed to follow the formal requirements for error identification. This court found that because the petitioner had presented the issue to the state court, albeit in an improper form, he had exhausted state remedies. The opinion cites *Wainwright* only in connection with the issue of exhaustion and does not mention the cause and prejudice test because it was not at issue in the case.

Even if prosecutorial misconduct were sufficient to excuse a failure to object in the context of *Wainwright*, our decision would be unchanged. In the present case, defense counsel did object; his error was in failing to perfect his objection. Against the background of his frequent objections throughout the trial and throughout the prosecutor's argument, his objection appears to have been largely an off-handed comment, more for the purpose of impressing the jury than to get a ruling. A holding excusing an attorney who is stymied by prosecutorial misconduct is not justified when the attorney was unshaken by the misconduct, but merely failed to carry through on his responsibilities.

McKinney's second explanation for defense counsel's failure to perfect the objection is that the attorney was intimidated by the prosecutor's remarks. An examination of the trial court transcript shows no specific evidence of this; such a contention is wholly speculative. In addition, the transcript as a whole makes this contention untenable. Defense counsel objected vigorously throughout the entire trial despite the remarks of the prosecutor and the trial court's numerous rulings against him. There is nothing to show that he was suddenly stricken with fear at the last moment of the trial. Had defense counsel truly feared the wrath of the prosecutor or the court, or that his continued objections would prejudice his client's case in the eyes of the jury, he

would not have made this objection, or many earlier objections, in the first place. As we stated above, the rule excusing the omissions of a stymied attorney will not save one who fails to finish the job he was bold enough to begin.

Finally, while the closing argument of the prosecutor went far beyond the proper bounds, it must be noted that it somewhat fit into the general tenor of the entire trial. The closing argument of the defense attorney might have been a stimulus to the prosecutor's improper closing argument. Furthermore, the transcript makes clear that defense counsel was guilty of improper comment and argument, perhaps in equal measure, throughout the course of a trial which fell far short of a model of the orderly search for truth which is the jurisprudential ideal. Under these circumstances, we cannot say that defense counsel's procedural default is excusable,[1] or that the trial lacked fundamental fairness.

While we expressly disapprove of the conduct of the prosecuting attorney, we must nevertheless conclude that it is insufficient to satisfy the cause elements of the *Wainwright* test in this case. Therefore we reverse the judgment of the district court granting the writ of habeas corpus.

REVERSED.

TATE, Circuit Judge, dissenting:

I respectfully dissent.

The majority has quoted the most improper concluding argument made by the prosecutor. The majority has not, however, detailed the repeated prior improprieties by the prosecutor, and the unsuccessful attempts by the defendant's counsel to have the court assert curative action against these grossly improper arguments. It was in the light of these past continuous improprieties, as well as of this quoted concluding argument (just before the jury retired) that the present trial court concluded: "In the context of McKinney's trial and against the 'backdrop' of the prosecutor's earlier arguments, the Court does not hesitate to find that the argument about which McKinney complains was so egregious that it deprived him of his right to a fair trial under the due process clause."

My brethren of the majority somewhat lightly disagree with this conclusion. Rather, they emphasize that under *Wainwright v. Sykes* a procedural default under Texas law bars federal habeas relief.

The defendant's counsel did object to the grossly improper argument (as he had consistently to previous such exhibitions). The state procedural default here is that counsel, although objecting, did not obtain an express ruling by the state trial court upon the objection. *McKinney v. State*, 506 S.W.2d 536, 541 (Tex.Crim. App.1974). As the Texas appellate decision states: "The record reflects that immediately after appellant objected to the prosecutor's argument the court retired the jury for deliberations without ruling on said objection."

Prejudice is clearly shown by the grossly improper argument. The issue, then, is whether under *Wainwright v. Sykes* there was "cause" for the defense counsel's failure to obtain a ruling upon his objection—a ruling that would as undoubtedly have been adverse, as was the case for most of his previous objections.

1. McKinney has not raised the issue of ineffective assistance of counsel in this appeal. The failure to perfect the critical objection in this case however, does raise the issue of whether the failure is a reflection of a general ineptness of counsel. A review of the transcript does not show such a general ineptness, however.

I would agree with the present district court that adequate cause is shown for this minor procedural default.[1] The court stated:

> To the extent that respondent relies on Texas' "contemporaneous objection" rule to frustrate McKinney's claim, *see McKinney v. State*, 505 S.W.2d 536, 541 (Tex.Crim.App.1974), the Court is of the opinion that McKinney has demonstrated the necessary "cause and prejudice" to circumvent the rule's strictures. Eubanks' repeated improprieties caused Atkins to fail to press his objection to the complained-of remark. *Cf. United States v. Garza*, 608 F.2d 659, 666 (5th Cir. 1979) ("while defense counsel could and, indeed, should have objected to the first instances of improper comment by the prosecutor, at some point the transgressions of this prosecutor cumulated so greatly as to be incurable; then objection to these extremely prejudicial comments would serve only to focus the jury's attention on them"); *Houston v. Estelle, supra* [569 F.2d 372 (5th Cir. 1978)] at 381–82 (repeated instances of improper argument and improper comments on defense counsel's successful objections may mitigate defendant's duty to object). The inherent prejudice in Eubanks' last remarks is evident.
>
> [T]he most important problem facing the jury was its decision to credit the testimony of ... the [state's] witnesses or that of [the defendant] .... The prosecutor's comments ... were expressly intended to influence this critical credibility choice; he introduced for the jury's consideration his own personal opinion as to this choice, suggested the existence of information beyond that presented at trial to support his witnesses' credibility, and sought to use the status and influence of the entire government investigatory apparatus to bolster the believability of this case.

U. S. v. Garza, supra at 665–66 (footnote omitted).

As Judge Rubin recognized in his separate opinion in *Cronnon v. Alabama, supra* [587 F.2d 246 (5th Cir. 1979)] at 252 (Rubin, concurring in the result), claims of improper jury argument necessitate judicial linedrawing. Eubanks' argument was clearly more improper and more prejudicial than those approved in *Cronnon v. Alabama, supra*, and *Alvarez v. Estelle, supra* [531 F.2d 1319 (5th Cir. 1976)] but not nearly so egregious as that condemned in *Houston v. Estelle, supra*. However, the Court is convinced that Eubanks' final remarks, rife with suggestions that the court and defense counsel had frustrated the prosecution's attempts to present all of the evidence and laced with his firm personal conviction of McKinney's guilt, crossed the boundaries of constitutionality and propriety, and deprived McKinney of the fundamentally fair trial to which he was entitled.

Accordingly, I respectfully dissent.

1. I will not dwell upon the factual lack of opportunity, without interrupting the jury's process of leaving the courtroom, if the defendant's counsel had asked the court once again for a ruling that undoubtedly would have overruled the defense objection of improper prosecutorial argument, as on repeated earlier occasions. The record shows that, *immediately* following defense counsel's objection, the state trial court, without referring to it, immediately announced to the jury: "Ladies and gentlemen, you will take the Court's charge, retire to the jury room, elect a foreman, and when you have arrived at a verdict, knock on the door and we will receive it."

Adm. Office, U.S. Courts—West Publishing Company, Saint Paul, Minn.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT *
UNIT A

NO. 80-2296

U.S. COURT OF APPEALS
FILED
OCT 28 1981

GILBERT E. GANUCHEAU
CLERK

PAUL ABRAHAM McKINNEY,

Petitioner-Appellee,

versus

W. J. ESTELLE, JR., Director,
Texas Department of Corrections,

Respondent-Appellant.

- - - - -

Appeal from the United States District Court for the
Northern District of Texas

- - - - -

ON PETITION FOR REHEARING

(October 28, 1981)

Before CHARLES CLARK, TATE and WILLIAMS, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby denied

ENTERED FOR THE COURT:

J. C. Williams
United States Circuit Judge

CLERK'S NOTE:
SEE RULE 41 FRAP AND LOCAL RULE 17 FOR STAY OF THE MANDATE

*Former Fifth Circuit case, Section 9(1) of Public Law 96-452-October 14, 1980.

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IN THE UNITED STATES SUPREME COURT
OCTOBER TERM, 1981

PAUL ABRAHAM MCKINNEY,

PETITIONER,

V.

W. J. ESTELLE, JR., DIRECTOR
TEXAS DEPARTMENT OF CORRECTIONS,

RESPONDENT.

NO. 81 5952

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

Petitioner, Paul Abraham McKinney, moves the Court for an order permitting him to proceed in this Court, in forma pauperis, with a Petition for Writ of Certiorari, to the United States Court of Appeals for the Fifth Circuit, pursuant to the provisions of Title 28, United States Code, Section 1915, and Rules of this Court, and in support thereof attaches the affidavit of said Petitioner.

Respectfully submitted,

Mark Troy

Of Counsel, Mark A. Troy

CERTIFICATE OF SERVICE

I, Mark A. Troy, do hereby certify that a copy of the above and foregoing Motion for Leave to Proceed in Forma Pauperis has been served by placing same in the United States Mail, postage prepaid, addressed as follows: Charles A. Sharman, Assistant Attorney General for the State of Texas, Capitol Station, Austin, Texas 78711, herein on this the 23 day of DECEMBER, 1981.

Mark Troy

Mark A. Troy

RECEIVED
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SUPREME COURT U.S.

IN THE UNITED STATES SUPREME COURT
OCTOBER TERM, 1981

PAUL ABRAHAM MCKINNEY,

Petitioner,

v.

W. J. ESTELLE, JR., DIRECTOR,
TEXAS DEPARTMENT OF CORRECTIONS,

AFFIDAVIT OF PETITIONER

STATE OF TEXAS)
)
COUNTY OF HOUSTON)

PAUL ABRAHAM MCKINNEY, being duly sworn, deposes and says:

1. I am a citizen of the United States and the Petitioner in the above-entitled action.

2. I desire to apply for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit to review its judgment, entered on October 28, 1981, pursuant to 28 U.S.C. 1254 (1), but because of my poverty I am unable to pay the costs of such appeal or give security therefor and still be able to provide myself with the bare necessities of life.

3. I believe I am entitled to the redress I seek by such an application, and that such an application presents a very substantial question of law. The nature of the question to be presented is: Whether the Court of Appeals has rendered a decision regarding the contemporaneous objection rule that is in direct conflict with the opinions of this Court regarding fundamentally fair trial, the law and facts of the case, as well as the decisions of the Court of Criminal Appeals for the State of Texas wherefrom the case arose.

I contend that the United States Court of Appeals for the Fifth Circuit erred in reversing the lower Federal Court's order granting habeas corpus relief.

Paul A. McKinney

SUBSCRIBED AND SWORN TO before me, by the said Paul Abraham McKinney, this the 21 day of December, 1981, to certify which witness my hand and seal of office.

J. L. Stephens
NOTARY PUBLIC IN AND FOR
THE STATE OF TEXAS

J. L. Stephens
Notary Public
State of Texas

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IN THE UNITED STATES SUPREME COURT
OCTOBER TERM, 1981

PAUL ABRAHAM MCKINNEY

Petitioner,

v.

W. J. ESTELLE, JR., DIRECTOR
TEXAS DEPARTMENT OF CORRECTIONS,

Respondent.

NO. 81 5952

MOTION FOR LEAVE TO FILE
PETITION FOR WRIT OF CERTIORARI

TO THE HONORABLE SUPREME COURT OF THE UNITED STATES:

Petitioner, PAUL ABRAHAM MCKINNEY, prays the Honorable Court grant leave for him to file a petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit in forma pauperis and the relief sought in the petition for certiorari and all other relief deemed proper by the Court.

WHEREFORE, petitioner prays the Honorable Court grant leave to file for the foregoing reasons.

Respectfully submitted,

Mark Troy

Of Counsel, Mark A. Troy,
One Main Place
Dallas, Texas 75250

Opposition

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NO. 81-5952

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

PAUL ABRAHAM MCKINNEY,

Petitioner

V.

W. J. ESTELLE, JR.,

Respondent

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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Attorney General of Texas

JOHN W. FAINTER, JR.
First Assistant
Attorney General

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Executive Assistant
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ATTORNEYS FOR RESPONDENT

QUESTION PRESENTED

Whether failure to pursue an objection to a ruling in compliance with the contemporaneous objection rule is excused from state procedural default by an adequate showing of "cause" under the facts of this case?

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NO. 81-5952

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

PAUL ABRAHAM MCKINNEY,

Petitioner

V.

W. J. ESTELLE, JR.,

Respondent

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

TO THE HONORABLE JUSTICES OF THE SUPREME COURT:

NOW COMES W. J. Estelle, Jr., Director, Texas Department of Corrections, Respondent herein, by and through his attorney, the Attorney General of Texas, and files this his brief in opposition:

OPINIONS BELOW

Petitioner's statement of the opinions below is correct. They are attached as appendices to the petition for writ of certiorari.

JURISDICTION

This Court has jurisdiction under 28 U.S.C. §1254(1). Petitioner's timely filed motion for rehearing in the court below was denied on October 28, 1981. This petition was filed on December 28, 1981, within ninety days.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Petitioner relies upon the Sixth and Fourteenth Amendments to the United States Constitution.

STATEMENT OF THE CASE

Respondent agrees with Petitioner's statement of the case.

SUMMARY OF THE ARGUMENT

The facts underlying the petition are too ambiguous to render this case a proper one for the Court's consideration. The case is not an appropriate one for refining the "good cause" element of Wainwright v. Sykes, 433 U.S. 72 (1977). The record, in fact, is susceptible of varying interpretations. The arguments presented by Petitioner in the courts below have been unclear. There are factual, interpretive and legal errors in the petition for writ of certiorari.

Petitioner fails to discuss critically the contemporaneous objection rule, the rationales for imposing procedural default, and the implications of either fundamental error or ineffective assistance of counsel.

Finally, it is only speculative that anything fundamentally unfair actually occurred at Petitioner's trial. Petitioner has shown no good cause for failure to object at trial to the prosecutor's argument of which he now complains.

REASONS WHY THE WRIT SHOULD BE DENIED

Petitioner asks this Court to decide whether "good cause" under Wainwright v. Sykes, 433 U.S. 72 (1977), is

shown by the facts of this case. Petitioner complains of improper prosecutorial jury argument. The State of Texas has refused him relief specifically because of his attorney's failure to comply with the state's correct contemporaneous objection rule to preserve error. This failure to obtain a ruling, even though he did make an initial objection, was held by the Court of Appeals to be a procedural default. Under the "adequate and independent state grounds" rationale as discussed in Sykes, such a default precludes a state prisoner from obtaining federal habeas corpus relief unless he demonstrates both "good cause" and "actual prejudice." Wainwright v. Sykes, 433 U.S. 72, 81, 87 (1977). Petitioner has demonstrated neither.

Petitioner's trial counsel, Jerry Atkins, failed to pursue his last objection, but the record fails to reflect with certainty the precise reason. He did, in fact, initially object (SOF 349) in response to an improper prosecutorial jury argument. The prosecutor argued that he would "make a project out of [re-trying the defendant]" as long as he was a prosecutor if the jury were unable to reach a verdict. The precise objection was: "He's testifying on behalf of the District Attorney [Henry Wade]." The very next entry in the record contains the instructions by the trial court to the jury to retire for deliberation. The proper interpretation to be given this exchange is disputed.

In his petition for rehearing directed to the Fifth Circuit, Petitioner speculated that Atkins failed to pursue his objection because he was "intimidated by the trial judge, thereby clearing the way for the prosecutor's inflammatory remarks." Petitioner contends this is the reason Atkins was "prohibited from making contemporaneous objections." His petition for writ of certiorari echoes this suggestion:

> "[Atkins] failed to perfect his repeated objections to the spate of inflammatory arguments by the State's attorney (despite the fact the trial judge once told defense counsel to sit down during his objections and again ignored defense counsel's objections to the State's closing arguments)." [Petition at 5].

The actual passage in the record reflects the response of the trial court to one of Atkins's objections:

> "THE COURT: No, Counsel, I'm not going to sustain that objection. Let the attorney finish, please, sir." [SOF 345].

Sixty-three lines of prosecutorial argument follow this passage, uninterrupted until Atkins makes his last objection. [SOF 345-49]. The record, therefore, reflects no initimidation of defense counsel. Any such conclusion would be wholly speculative.

It is equally possible that defense counsel failed to obtain a ruling because of ignorance, incompetence, inadvertence, or, more probably, as a tactical choice. A careful reading of the trial record indicates at least fifty-two identificable defense objections. Of these, thirty-two were overruled, sixteen were sustained and four received ambiguous rulings or were ignored. Atkins made one continuing objection, two requests for instructions to disregard and two requests for permission to object or move outside the presence of the jury. He made two motions for a mistrial. He is demonstrably familiar with the mechanics of the Texas correct contemporaneous objection rule.

Atkins also represented Petitioner through his state appeal. His brief vigorously argues his motions for a mistrial. His brief plainly reflects knowledge of the procedure necessary for proper compliance with the contemporaneous objection rule.

Thus, as found by the Court of Criminal Appeals, Atkins was bold enough "to finish the job he was bold enough to begin." It appears that Atkins's objection was merely "an

off-handed comment, more for the purpose of impressing the jury than getting a ruling." McKinney v. Estelle, slip op. at 1178; App. B at 4.

Adequate cause is simply not discernible from a record which is susceptible of opposite interpretations after objections.

Petitioner has shown no reason to conclude he would have been denied relief in any Texas court if his trial counsel had complied with the contemporaneous objection rule. His intimidation argument is only relevant at the trial level. The State of Texas will not defend the propriety of the closing arguments noted. The State, however, emphatically asserts its right to correct or discipline its own judicial agents according to reasonable and practical rules. Texas trial courts are generally capable of policing the behavior of Texas prosecutors given a correct and timely objection pressed to an adverse ruling. Given the record preserved for appeal by such objections, the Texas Court of Criminal Appeals is equally capable of policing the occasional trial court that cannot or will not control its prosecutors.

Petitioner fails to discuss the implications of either fundamental error or ineffective assistance of counsel as alternative grounds of state or federal relief. These are separate issues which need to be interwoven into any newly fashioned "cause" element to avoid confusion and overlap.

In summary, it is only speculative that anything fundamentally unfair actually happened at the time Atkins failed to pursue his objections. He may well have had a meritorious objection then. The record is sufficiently ambiguious as to any possible showing of adequate cause that this case would not, on its facts, be a proper one for expanding the question specifically reserved in Sykes: "the precise definition of the 'cause' ... standard." 433 U.S. at 89.

CONCLUSION

WHEREFORE, PREMISES CONSIDERED, Respondent respectfully prays that the petition for writ of certiorari be denied.

Respectfully submitted,

MARK WHITE
Attorney General of Texas

JOHN W. FAINTER, JR.
First Assistant Attorney General

RICHARD E. GRAY, III
Executive Assistant Attorney General

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